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9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 MELVIN ANTHONY JR., pro se

12 Plaintiff

13 v.

14 CACH, LLC, a Colorado limited
15 liability company,

16 Defendant.

CASE NO. CV12-9057-CAS (JCGx)

**NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: January 14, 2013

Time: 10:00 a.m.

Ctrm.: 5, 2nd Floor

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1 PLEASE TAKE NOTICE that on a date to determined by the Court if
 2 necessary, or as soon thereafter as this matter may be heard in Courtroom A, of the
 3 above-entitled Court, located at U.S. District Court, Central District of California,
 4 Western Division, 312 North Spring Street, Los Angeles, CA 90012-4701,
 5 Defendant CACH, LLC ("CACH" or "Defendant") will move to dismiss the
 6 Complaint of Plaintiff MELVIN ANTHONY JR. ("Plaintiff") pursuant to Federal
 7 Rule of Civil Procedure 12(b)(6).

8 The ground for this Motion is that the Complaint fails to state a claim upon
 9 which relief can be granted. Specifically, the Complaint does not contain facts
 10 sufficient to meet the pleading standards articulated by the Supreme Court in *Bell*
 11 *Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) ("*Twombly*") and *Ashcroft v.*
 12 *Iqbal*, 129 S.Ct. 1937 (2009) ("*Iqbal*").

13 This Motion is based on this Notice, the attached Memorandum of Points and
 14 Authorities, the Request for Judicial Notice, the Proposed Order filed and served
 15 concurrently herewith, all papers and pleadings on file, and on such further oral and
 16 documentary evidence that may be offered at the Motion hearing.

17
 18 DATED: November 9, 2012

HAYES SCOTT BONINO ELLINGSON &
 McLAY, LLP

19
 20
 21 By: 

22 STEPHEN A. SCOTT
 23 DARA M. TANG
 24 Attorneys for Defendant
 25 CACH, LLC
 26
 27
 28

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This action arises out of the collection of a credit card debt owed by Plaintiff. It appears Plaintiff contends that Defendant CACH violated the Fair Credit Reporting Act, 15, U.S.C. §1681 *et. seq.* ("FCRA") and the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* ("FDCPA") by (1) pulling Plaintiff's credit report, (2) by failing to provide a validation of debt after service of the September 1, 2011 state court collection action, and (3) by virtue of "overshadowing" because communications between the parties discussed the alleged amount owed and solicit methods to tender immediate payment thereby defeating the consumer warning. However, Plaintiff fails to allege any facts supporting his claims, and all of Plaintiff's claims fail on separate and independent grounds.

First, Defendant had a permissible purpose to pull Plaintiff's credit report in that Defendant used the information in "review or collection of an account of, the consumer." 15 U.S.C. §1681b(a)(3)(A). Plaintiff's conclusions that "at no time did Plaintiff ever have a relationship of any kind with Defendant as defined within the FCRA 15 U.S.C. §1681b(3)(A)-(F)" and that "Defendant did not have a lawful purpose for requesting, obtaining, or using Plaintiff's consumer credit report" are not enough to state a plausible claim for relief under the FCRA. *See*, Complaint ¶¶8, 9; *See, Makreas v. The Moore Law Group, A.P.C.*, 2011 U.S. Dist. LEXIS 11723, at *10 (N.D. Cal. 2011) (conclusory allegation that FCRA violation occurred as defendant had "no permissible purpose" fails to state a claim.) Furthermore, as explained below, Plaintiff's claim that Defendant was required to report the debt as disputed is wrong because §1681(i) does not apply to Defendant. Plaintiff's Count III under the FCRA fails because Defendant had a permissible purpose and Plaintiff cannot allege a sufficient factual basis to hold Defendant liable under §1681(i).

1 Second, the Complaint itself establishes why Plaintiff's validation of debt
 2 claim under §1692(g) of the FDCPA is entirely misplaced. Plaintiff alleges that the
 3 initial communication was service of the September 1, 2010 state complaint. *See*,
 4 Complaint ¶¶12, 13. Yet, Plaintiff admits that he did not request validation of the
 5 debt until over a year later on September 10, 2012. *Id.* ¶10, p. 5. Count I
 6 accordingly fails because Plaintiff only had thirty days to request validation of the
 7 debt. 15 U.S.C. §1692g(A)(4).

8 Finally, Plaintiff has failed to plead facts supporting Count II, in which he
 9 vaguely claims that "the communications from the Defendants to the Plaintiff
 10 discuss [the] alleged amount owed and solicit methods to tender immediate
 11 payment, which overshadows the consumer warning." Complaint at p. 6. Plaintiff
 12 fails to explain what document he is referring to and also fails to explain how there
 13 is an actual contradiction. Moreover, there is nothing improper in issuing a written
 14 communication that offers a method of payment to a consumer. *See, Higgins v*
 15 *Capitol Credit Services, Inc.*, 762 F. Supp 1128, 1135 (1991 U.S. Dist. Del.)
 16 (Holding that collection agency's follow-up notice to debtor was not improper
 17 under 15 USCS § 1692g(a), where notice said that account must be settled within 10
 18 days to stop legal action from commencing, because notice merely encouraged
 19 payment of debt and did not overshadow debtor's right to dispute debt within 30
 20 days of initial notice.) Without a specific allegation identifying an actual
 21 communication that overshadowed a statutorily imposed warning, Plaintiff's Count
 22 II must be dismissed.

23 Plaintiff has failed to plead facts establishing a violation of either the FDCPA
 24 or the FCRA (or the California Rosenthal Act.) Instead, Plaintiff merely recites a
 25 statutory definition, pleads vague facts, or pleads facts that defeat his claim.
 26 Accordingly, Plaintiff's Complaint should be dismissed with prejudice pursuant to
 27 Fed. R. Civ. Pro. 12(b)(6) as any leave to amend would be futile.

II.
ALLEGED FACTS

Plaintiff obtained and opened a credit card from Bank of America, N.A. (See Request for Judicial Notice, Exhibit A ¶5). After Plaintiff defaulted on his account, Bank of America sold and assigned Defendant CACH all of its rights associated with the account. (See Request for Judicial Notice, Exhibit A ¶¶6, 10.)

Plaintiff alleges that on November 22, 2010, Defendant obtained his credit report from Experian, TransUnion and Equifax for no lawful purpose, despite Plaintiff having defaulted on his credit card debt. (Complaint ¶7,9.)

On or around September 10, 2012, Plaintiff mailed a letter of dispute to Defendant. (Complaint ¶10.) There is no indication of what Plaintiff was disputing in these letters. Plaintiff alleges that Defendants failed to mark Plaintiff's credit report as "in dispute." (Complaint ¶15.)

On or about May 15, 2012, Plaintiff contacted Experian, TransUnion, and Equifax to dispute the debt. (Complaint p.5.)

On or about September 1, 2011, Defendant, through its counsel, the Mandarich Law Group, filed a complaint in state court to collect the debt owed by Plaintiff ("State Court Action.")¹ (Complaint ¶12.)

On or about September 10, 2012, Plaintiff sent Defendant a letter disputing the debt and seeking validation of the debt. (Complaint p. 5.)

On or about October 22, 2012, Plaintiff filed this present complaint, seeking damages for alleged violations of the FRCPA and FCRA.

III.
STANDARD

A motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. To survive a motion to dismiss, the complaint's

¹ Plaintiff alleges that the State Court Action is attached as Exhibit "A" to his complaint, but the filed complaint does not appear to have the exhibit. Defendant respectfully requests the court take judicial notice of the State Court Action.

1 “factual allegations must be enough to raise a right to relief above the speculative
 2 level on the assumption that all of the allegations in the complaint are true.” *Bell*
 3 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 127 S.Ct. 1955 (2007). Moreover, a
 4 motion to dismiss must be granted if the complaint does not allege facts necessary to
 5 support a cognizable legal claim that is “plausible on its face.” *Bell Atlantic Corp. v.*
 6 *Twombly*, *supra*, 550 U.S. at 545.

7 When considering a motion to dismiss, the court is “not bound to accept as
 8 true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S.
 9 662, 129 S.Ct. 1937, 1949-1950 (2009). The court must determine whether the
 10 *evidentiary facts* alleged in the complaint support a plausible right to relief that rises
 11 above the “speculative level.” *Bell Atlantic Corp. v. Twombly*, *supra*, 550 U.S. at
 12 570. This plausibility standard requires the *factual* allegations of the complaint to
 13 reveal more than “a sheer possibility that a defendant has acted unlawfully.”
 14 *Ashcroft v. Iqbal*, *supra*, 129 S.Ct. at 1949. As the Supreme Court explained in
 15 *Iqbal*: “A pleading that offers labels and conclusions or a formulaic recitation of the
 16 elements of a cause of action will not do. Nor does a complaint suffice if it tenders
 17 naked assertions devoid of further factual enhancement.” *Id.* (internal quotes and
 18 citations omitted.)

19 In ruling on a 12(b)(6) motion to dismiss, the court is not limited to what is
 20 alleged in the plaintiff’s complaint. The court may consider material submitted with
 21 the complaint, such as attachments and exhibits. *Hal Roach Studios, Inc. v. Richard*
 22 *Feiner & Co., Inc.*, 896 F.2d 1542, 1555 fn.19 (9th Cir. 1990); *Neilson v. Union Bank*
 23 *of California*, 290 F.Supp.2d 1101, 1112 (C.D. Cal.2003). The court may also
 24 consider documents referred to in the complaint even when such documents are not
 25 attached to the complaint itself when the parties do not dispute the authenticity of the
 26 document. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 fn. 4 (9th
 27 Cir. 1996). Courts have held that when a plaintiff chooses not to attach to the
 28 complaint or incorporate by reference a document on which it solely relies and

1 which is integral to the complaint, “the defendant may produce that document when
 2 attacking the complaint for its failure to state a claim, because plaintiff should not so
 3 easily be allowed to escape the consequences of its own failure.” *In re Northpoint*
 4 *Communications Group, Inc., Securities Litigation*, 221 F.Supp.2d 1090,1095 (N.D.
 5 Cal.2002; *Neilson v. Union Bank of California*, 290 F.Supp.2d 1101, 1114 (C.D.
 6 Cal.2003)). “Defendant may attach to a Rule 12(b)(6) motion the documents referred
 7 to in the complaint to show that **they do not** support plaintiff’s claim.” *Branch v.*
 8 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) emphasis added. Furthermore, the court
 9 need not accept the allegations of a complaint as true when an exhibit to a motion to
 10 dismiss contradicts allegations in a complaint. See *Luna v. Kemira Specialty, Inc.*,
 11 575 F.Supp.2d 1166, 1176 (9th Cir. 2008).

12 Here, Plaintiff’s Complaint fails to state actionable facts and must be
 13 dismissed.

14 IV. 15 ARGUMENT

16 A. Plaintiff Fails to Plead a Plausible Claim for Relief Under the FCRA.

17 Plaintiff’s Complaint falls woefully short in pleading a plausible claim for
 18 relief under either the FCRA or the FDCPA. Although his Complaint alleges
 19 violations of §1681(b) and §1692g, Plaintiff fails to plead anything more than
 20 conclusory elements of a cause of action or self-defeating facts. In doing so,
 21 Plaintiff fails to provide the “showing” necessary to entitle him to relief. *Twombly*,
 22 550 U.S. at 555.

23 In support of his FCRA claim, Plaintiff alleges that Defendant pulled his
 24 credit report on November 22, 2010 without a permissible purpose because “[a]t no
 25 time did Plaintiff ever have a relationship of any kind with Defendant” and
 26 “Defendant did not have a lawful purpose for requesting, obtaining or using
 27 Plaintiff’s consumer credit.” Complaint ¶¶ 8, 9. Plaintiff willfully ignores,
 28 however, that a debt collector may obtain a consumer report if the collector does so

1 for the purposes of collecting a debt. *See*, 15 U.S.C. §1681b(a)(3)(A); *Pyle v. First*
 2 *National Collection Bureau*, 2012 U.S. Dist. LEXIS 56737, *7-8 (E.D. Cal., April
 3 23, 2012); *see also*, *Rodriguez v. Cavalry Portfolio Services, LLC*, 2012 U.S. Dist.
 4 LEXIS 30295 (S.D. Cal., March 6, 2012) (“[Plaintiff] alleges that [Defendant pulled
 5 his credit report for an improper purpose. He is wrong. A debt collector may access
 6 a consumer’s credit report in the course of collecting a credit card debt from that
 7 consumer.”). “It is not necessary for Plaintiff to have had direct dealings with
 8 defendant in order for the defendant to lawfully obtain a consumer report.” *Id.*
 9 (quoting *Hinkle v. CBE Grp.*, 2012 U.S. Dist. LEXIS 26545 (S.D. Ga 2012)). If a
 10 debt collector is retained by a creditor to collect a debt owed by a consumer, then it
 11 typically has a permissible purpose for obtaining a consumer report in conjunction
 12 with its collection activities, so long as it seeks to use the information in connection
 13 with a transaction that the consumer initiated with the original creditor. *Id.*

14 Here, Defendant, who purchased Plaintiff’s delinquent account, retained the
 15 MANDARICH LAW GROUP, LLP to pursue Plaintiff for an overdue balance in
 16 state court. A true and accurate copy of the state complaint is attached as Exhibit A
 17 to the Request for Judicial Notice.² The credit card debts arose from Plaintiff’s
 18 voluntary acquisition of credit from original creditor Bank of America, N.A. Exhibit
 19 A ¶5. CACH was assigned the all rights associated with the account by the creditor
 20 after Plaintiff defaulted. Exhibit A ¶¶6, 10. Needless to say, as Plaintiff and
 21 Defendant are in the midst of state court actions involving these debts, Plaintiff is
 22 well aware of the purpose for which Defendant pulled his credit report. As the *Pyle*
 23 Court emphasized:

24 “As [Defendant] appears to be a collection agency, Plaintiff’s
 25 conclusory allegations fail to sufficiently set forth facts to establish that

26 ² Defendant asks this Court to take judicial notice of that Pleading in considering this Motion. *See, United States v.*
 27 *Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); *accord In re Korean Air Lines, Co., Ltd.*, 642 F.3d 685, 689 n. 1 (9th Cir.
 28 2011); *United States v. Howard*, 381 F.3d 873, 876 n. 1 (9th Cir. 2004). Thus, this Court may take judicial notice of the
 record of the collateral proceedings in state court.

1 Defendant violated the FCRA. Plaintiff fails to establish that Defendant
2 was not, in fact, a collection agency, or that Plaintiff did not owe any
3 debt that Defendant was seeking to collect on behalf of another entity.”

4 *Pyle*, 2012 U.S. Dist. LEXIS 56737 at *9. As in *Pyle*, Defendant was clearly acting
5 to collect on debts and thus, had a permissible purpose. 15 U.S.C. §1681b(a)(3)(A).
6 It follows that Plaintiff has no cause of action.

7 Moreover, there is no basis to support Plaintiff’s FCRA claim pursuant to his
8 suggestion that Defendant was somehow required to report the debt as disputed.
9 *See*, Complaint at p. 7. The defendant cites 15 U.S.C. §1681i, but that applies to
10 furnishers of information, not Defendant. *See, Caltabiano v BSB Bank & Trust Co.*
11 387 F. Supp. 2d 135, 140-141 (2005 E.D. N.Y.) (holding that 15 U.S.C. §§
12 1681e, 1681g, and 1681i apply to consumer reporting agencies); *see also Rush v.*
13 *Macy's New York, Inc.*, 775 F.2d 1554, 1557 (7th Cir. 1985) (holding that only a
14 consumer reporting agency can be held liable for claims under the FCRA). There is
15 no support for the Complaint under 15 U.S.C. §1681i.

16 Further, even if Plaintiff had a cause of action, his conclusory allegations fail
17 to establish the willfulness necessary for damages. Here, Plaintiff alleges “willful”,
18 Complaint at p. 9, violations of the FCRA and must allege a factual basis to show
19 that “defendant acted willfully in violation of the FCRA to establish a claim for
20 statutory damages.” However, Plaintiff only provides conclusory allegations that
21 Defendant’s alleged violation of the FCRA was “willful.” *See*, Complaint ¶20. As
22 the court explained in *Pyle*, conclusory allegations of willful misconduct are
23 insufficient to state a claim for statutory and punitive damages under 15 U.S.C.
24 §1681n; *Pyle*, 2012 U.S. Dist. LEXIS 56737 at *12; *see also, Chavez*, 2011 U.S.
25 Dist. LEXIS at *4.

26 Plaintiff must allege how Defendant was individually involved in violating
27 his rights under the Rosenthal Act to avoid dismissal. *See, Myers v. Winn Law*
28 *Group; APC*, 2011 U.S. Dist. LEXIS 120448 (E.D. Cal. 2011) (dismissing claim by

1 pro se plaintiff where plaintiff alleged that pulling his credit report “under false
2 pretenses or knowingly without permissible purpose” violated the Rosenthal Act) .
3 Plaintiff has not done so and cannot do so. Accordingly, Count II must be dismissed
4 pursuant to Fed. R. Civ. P. 12(b)(6).

5 **B. Plaintiff Fails to Plead a Plausible Claim for Relief Under the FDCPA.**

6 Plaintiff alleges that Defendant violated the FDCPA by failing to provide
7 Plaintiff with validation of the debt. Complaint at p. 6. But his own factual
8 assertions show why Count I must be dismissed. Plaintiff alleges that the initial
9 communication was service of the September 1, 2010 state complaint. *See*,
10 Complaint ¶¶12, 13. Plaintiff also alleges that he did not request validation of the
11 debt until over a year later on September 10, 2012. *Id.* ¶10, p. 5. Count I fails
12 because Plaintiff only had thirty days to request validation of the debt. 15 U.S.C.
13 §1692g(A)(4). Plaintiff fails to even allege that he requested validation within 30
14 days. *See*, Complaint at p. 5. His factual assertions show he did not.

15 **C. Plaintiff Pleads No Facts Supporting Overshadowing.**

16 Plaintiff vaguely asserts that “communications” between the parties
17 overshadowed a consumer warning by discussing the amount owed and soliciting
18 methods to tender immediate payment. *See*, Complaint at p. 6. Plaintiff fails to
19 explain what communication he refers to and fails to explain any contradiction
20 overshadowing a consumer warning. A collection agency may issue a written
21 communication soliciting a method of payment without overshadowing a consumer
22 warning to dispute debt within 30 days of initial notice. *See, Higgins v Capitol*
23 *Credit Services, Inc.*, 762 F. Supp 1128, 1135 (1991 U.S. Dist. Del.) Here, Count II
24 must be dismissed because Plaintiff has failed to identify a communication or a
25 method of overshadowing and has instead pled facts that are merely consistent with
26 standard collection proceedings.
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V.
CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this matter be dismissed, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6) as any amendment would clearly be futile.

DATED: November 9, 2012

HAYES SCOTT BONINO ELLINGSON &
McLAY, LLP

By: 

STEPHEN A. SCOTT
DARA M. TANG
Attorneys for Defendant
CACH, LLC

1 **CASE NAME: Anthony v. CACH, LLC**

2 **ACTION NO.: CV12-9057-CAS (JCGx)**

3 **PROOF OF SERVICE**

4 I am a citizen of the United States. My business address is 203 Redwood Shores Parkway,
5 Suite 480, Redwood City, California 94065. I am employed in the County of San Mateo where this
6 service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily
7 familiar with my employer's normal business practice for collection and processing of
8 correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is
9 deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course
10 of business.

11 On the date set forth below, following ordinary business practice, I served a true copy of the
12 foregoing document(s) described as:

13 **NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF**
14 **POINTS AND AUTHORITIES**

- 15 ☐ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax
16 number(s) set forth below, or as stated on the attached service list, on this date
17 before 5:00 p.m.
- 18 ☒ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be
19 placed in the United States mail at Redwood City, California.
- 20 ☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand
21 this date to the offices of the addressee(s) by 12:00 p.m.
- 22 ☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an
23 overnight delivery carrier with delivery fees provided for, addressed to the
24 person(s) on whom it is to be served.
- 25 ☐ (BY E-MAIL) by transmitting via electronic mail the document(s) listed above to
26 the email address(es) set forth below, or as stated on the attached service list, on
27 this date before 5:00 p.m.

28 Melvin Anthony Jr.
c/o 6336 High Cliff Lane
Fontana, CA 92336
Telephone: 818.917.9570

In Pro Per

- 29 ☒ (Federal) I declare under penalty of perjury under the laws of the State of
30 California that the above is true and correct.

31 Executed on November 9, 2012 at Redwood City, California.

32 
33 Abigail Calderon